Fong Ah Tai & Ors v Fong Yoon Heng & Anor

HIGH COURT (IPOH) —CIVIL SUIT NO 22-354 OF 1999
BALIA YUSOF JC
10 JULY 2004

Succession — Executors — Accounts — Action for full and proper account of the estate — Whether account of estate prepared by executor constituted full and proper account

Succession — Executors — Duties of — Executors agreed to reduction in sale price — Whether executors acted in best interest of estate - Whether executors acted to detriment of beneficiaries

Succession — Executors — Executorship expenses — Executors unilaterally claimed commission fees — Whether executors required to apply to court first — Probate and Administration Act 1959 s 43

The defendants and the plaintiffs were the children of one Fong Sang ('the deceased'). The defendants were appointed the trustees under the deceased's will. The subject matter in the administration of the estate was three pieces of land ('the said property'). As executors and trustees, the defendants sold the said property for a sum of RM603,562.50. A sum of RM60,356.25 was paid to the defendants as deposit. Part of the said property was subject to land acquisition in which compensation of RM80,000 was paid to the defendants. Although the sale and purchase agreement ('SPA') indicated that the sale price was RM603,562.50 and the deposit had been paid to the defendants, the account rendered by the defendants showed that the sale price of the property was reduced to RM560,802.50. This price was inclusive of the compensation of RM80,000 for the part acquisition of the said property. Thus, the plaintiffs contended that there was a shortfall of RM42,760 which was not accounted for and remained unexplained by the defendants.

In the course of administering the estate, the defendants incurred the following expenses: (a) a sum of RM28,040.12 being 5% administration fees under s 43 of the Probate and Administration Act 1959 ('the Act'); (b) a sum of RM9,882.28 being payment for quit rent and assessment rates for 1997 and 1998; (c) a sum of RM4,000 being payment for broker's sale commission; and (d) a sum of RM5,000 being payment for legal fees and disbursements. The plaintiffs contended that these expenses were not allowable items and should not be charged to the account of the estate.

In this action, the plaintiffs prayed for the following reliefs: (a) that a full and proper account of the estate be supplied within seven days of the date of the order; and (b) that the defendants distribute the full amount of the monies or part of the monies of the estate in accordance with the share to be received by the plaintiffs as stated in the will. Alternatively, the plaintiffs prayed that the defendants be replaced by the first plaintiff as administrators of the estate ('alternative prayer').

Held:

(1) The defendants offered no explanation as to why the terms of the SPA were not followed. Furthermore, the clauses therein clearly provided that any land acquisition would not affect the sale price. In so agreeing to the lesser sale price, the defendants had not acted in the best interest of the estate and had acted to the detriment of the beneficiaries (see para 4).

(2) The account of the estate prepared by the defendants did not constitute a full and proper account. One of the basic duties of all executors or trustees is to render clear and accurate accounts for it is only through proper and accurate accounts that the beneficiaries could know whether the estate was being properly administered (see para 4).

(3) There was ample evidence to show that a legal practitioner was appointed to act for the defendants in their capacities as executors and trustees of the estate. Therefore, there was justification for the charging of the sum of RM5,000 to the account of the estate as legal fees and disbursements (see para 7).

(4) Similarly, the brokers' fees had also been incurred to help the defendants find a purchaser for the said property. The sum of RM9,882 was paid for quit rent and assessment rates for the years 1997 and 1998. The defendants' evidence on this was not seriously challenged by the plaintiffs and accordingly, the court accepted that those expenses were duly incurred by the defendants in administering the estate (see para 7).

(5) However, there was no justification for the claim of the 5% administration fees amounting to RM28,040.12. The defendants were not allowed to unilaterally claim the sum of RM28,040.12 as commission fees. Instead, the defendants had to make an application to the court under s 43 of the Act and show the court their conduct in administering the estate. Here, the defendants did not do much in the administration of the estate. On the contrary, there was delay on the part of the defendants in discharging their duties as executors of the estate (see paras 8 and 9).

(6) It was not necessary to consider the alternative prayer because the estate had been fully administered (see para 11).

(7) The account provided by the defendants did not reflect a clear and accurate account of the estate. There was a shortfall of RM42,760 which arose from the sale of the said property and which cannot be accounted for by the defendants. Further, the 5% commission fees (which were disallowed) must also be brought back to the account of the estate. These two sums must be distributed to the beneficiaries of the estate, including the defendants in their respective shares as stated in the deceased's will (see para 12).

[**Bahasa Malaysia summary**

Defendan dan plaintif adalah anak Fong Sang (si mati). Defendan telah dilantik sebagai pemegang amanah di bawah wasiat si mati. Isu di sini berkenaan dengan pentadbiran estet yang merupakan tiga bidang tanah (harta tersebut). Sebagai wasi dan pemegang amanah defendan telah menjual harta tersebut sebanyak RM603,562.50. Deposit sebanyak RM60,356.25 telah dibayar kepada defendan. Separuh dari tanah itu merupakan tanah perolehan di mana pampasan yang dibayar adalah RM80,000 dibayar kepada defendan. Walaupun perjanjian jual beli menjelaskan bahawa harga tanah tersebut adalah RM603,562.30 dan deposit telah pun dibayar kepada defendan akaun yang ditunjukkan oleh defendan menunjukkan bahawa baki harga tanah tersebut adalah RM560,802.50, jumlah ini termasuk pampasan sebanyak RM80,000 sebagai perolehan tanah estet tersebut. Jadi plaintif ingin penjelasan tentang RM 42,760 yang tidak dapat dijelaskan oleh defendan.

Dalam mentadbir estet tersebut, defendan telah mengalami perbelanjaan berikut; (a) jumlah sebanyak RM28,040.12 yang merupakan 5% dari fi pentadbiran di bawah s 43 Akta Probet dan Pentadbiran 1959 Akta tersebut) (b) jumlah sebanyak RM9,882.28sebagai bayaran cukai pintu dan taksiran untuk 1997 dan 1998 (c) RM4,000 sebagai pembayaran komisen kepada broker yang menjual tanah tersebut (d) RM5,000 sebagai upah guaman dan perbelanjaan. Plaintif juga menyatakan bahawa perbelanjaan ini tidak dipersetujui dan tidak patut dituntut dari akaun estet tersebut.

Dalam tindakan ini, plaintif telah memohon agar relif berikut diberikan (a) satu penyata akaun yang betul dan tepat dikemukakan dalam masa tujuh hari dari tarikh perintah itu (b) defendan mesti mengagihkan semua duit ataupun bahagian seperti yang tertakluk dalam wasiat si mati (c) plaintif memohon agar defendan diganti dengan plaintif pertama sebagai wasi estet tersebut (permohonan alternatif)

Diputuskan:

(1) Defendan tidak memberi apa-apa penjelasan terhadap terma yang terkandung dalam SPA tambahan pula klausa dalam SPA menjelaskan bahawa perolehan tanah tidak akan menjejaskan harga yang ditetapkan. Jadi dengan menerima harga yang lebih rendah defendan tidak bertindak demi manfaat yang terbaik estet tersebut dan telah merugikan benefisiari (lihat perenggan 4).

(2) Penyata akaun harta tersebut tidak mengandungi penyata akaun yang tepat. Satu tugas utama wasi dan pemegang amanah adalah untuk menyediakan penyata akaun yang tepat dan melalui akaun yang tepat inilah benefisiari dapat tahu bahawa estet itu ditadbir dengan betul (lihat perenggan 4).

(3) Terdapat bukti yang menunjukkan bahawa peguam telah dilantik untuk membantu mentadbir harta tersebut. Maka, terdapat justifikasi untuk mengenakan bayaran sebanyak RM5,000 ke atas akaun harta tersebut sebagai fi guaman dan perbelanjaan (lihat perenggan 7).

(4) Fi broker juga telah digunakan untuk membantu defendan mencari pembeli harta tersebut. Jumlah sebanyak RM9,882 telah dibayar sebagai cukai pintu dan taksiran bagi 1997 dan 1998. Bukti yang dikemukakan oleh defendan tidak dicabar secara serius oleh plaintif dan mahkamah bersetuju bahawa perbelanjaan yang dikenakan itu memang patut diambil dari estet tersebut (lihat perenggan 7).

(5) Tidak ada justifikasi untuk tuntutan 5% yang berjumlah sebanyak RM28,040.12. Defendan tidak dibenarkan memohon jumlah sebanyak RM28,040.12 sebagai fi komisen tetapi defendan sepatutnya membuat permohonan dari s 43 Akta tersebut dan menunjukkan di mahkamah cara defendan mentadbir tanah tersebut. Defendan di sini tidak melakukan pentadbiran secara seluruh kerana terdapat penangguhan masa di pihak defendan dalam menjalankan tugas mereka sebagai wasi dan pentadbir (lihat perenggan 8 dan 9).

(6) Penelitian permohonan alternatif tidak diperlukan kerana estet telah ditadbir dengan sepenuhnya (lihat perenggan 11).

(7) Penyata akaun yang diberikan defendan tidak menjelaskan urusan akaun yang tepat. Terdapat kekurangan sebanyak RM42,760 yang tertimbul dari jualan harta tersebut dan tidak boleh dijelaskan oleh defendan. Tambahan pula fi komisen 5% (yang tidak dibenarkan) mesti dibawa balik kepada akaun harta tersebut. Kedua jumlah wang itu mestilah dipulangkan ke estet dan dibahagikan mengikut wasiat si mati kepada semua benefisiarinya termasuk defendan (lihat perenggan 12).]

Notes

For cases on accounts of executors, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2186-2190.

For cases on amendment of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4396-4423.

Cases referred to

Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi &Ors [1998] 4 AMR 3904 (refd)

Ligar Fernandez v Eric Claude Cooke [2002] 5 MLJ 177 (refd)

Rachel Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as trustee of the estate of Ong Soon Hoe @ Patrick Ong) [1998] 1 AMR 600 (refd)

Legislation referred to

Probate and Administration Act 1959 s 43

Choy Kam Lee (KL Choy & Co) for the plaintiff

Meor Shaazizi Bin Meor Shaari (LA Gomes, Meor Shaazizi & Associates) for the defendant

Balia Yusof JC:

[1] The plaintiffs are the children and beneficiaries of the estate of Fong Sang who died leaving a will naming the defendants as the trustees. Both the defendants are also the children of the said Fong Sang deceased. The defendants were also appointed as the executors of the estate. A grant of probate was granted to the defendants on 25 April 1998. The suit against the defendants was filed out of the failure of the defendants to distribute the proceeds of the sale of the properties belonging to the estate and to provide a full and proper account of the estate. In their statement of claim, the plaintiffs pray for the following reliefs:

1) That a full and proper account of the estate be supplied within seven days of the date of the order.

2) The defendants distribute the full amount of the monies or part of the monies of the estate of the deceased in accordance with the share to be received by the plaintiffs as stated in the will.

3) Alternatively, that the defendants be replaced by the first plaintiff as administrators of the estate.

4) The defendants pay interest at 8% per annum on the share due to the plaintiffs from 10 January 1997 until full settlement, and

5) Costs of this proceeding.

[2] As executors and trustees, the defendants by an agreement dated 10 Janaury 1997 sold the three pieces of land belonging to the estate for a price of RM603,562.50 and received a sum of RM60,356.25 equivalent to 10 percent of the purchase price as a deposit. The said property was also the subject of a land acquisition matter in which compensation of RM80,000 was paid to the defendants. According to the terms of the agreement, any acquisition on the said property will not in any way affect the transaction and shall not invalidate the sale and purchase agreement. In the course of the trial, evidence was led by both parties and various documents were tendered as agreed documents. One such document is the account belonging to the estate which has been admitted as at pp 9 and 10 of Enclosure 14 (Exhibit P3).

[3] Enclosure 14 is an agreed bundle of documents and both parties agree that it reflects the state of affairs of the administration of the estate by the defendants. It is further established that as at the date of the hearing of this suit, the administration of the estate has been finalised, and from the evidence adduced by both the plaintiff and the defendant, I find that the estate has been fully administered. It was further established in the course of the trial that all the ten beneficiaries have been paid their respective shares in accordance with the will of the deceased. The balance of the purchase price of the land was paid to the defendant on 25 November 1998 (p 21 Enclosure 14) and the last payment to the plaintiffs was made on 20 March 2001, well after the filing of the suit (Exhibit D4). The statement of account of the estate as disclosed and mentioned above clearly shows that

the three pieces of land belonging to the estate are the only subject matter in the administration of the estate and it is the proceeds from the sale of these properties that the plaintiffs are claiming. The plaintiffs claim that what is reflected in the account and finally distributed to the beneficiaries, is not properly reflected in the same and that there are further sums which ought to be paid to the beneficiaries and that the defendants have been delaying the distribution of their share.

[4] From the evidence adduced, both oral and documentary, it was established that although the sale and purchase agreement indicated the price to be RM603,562.50 and 10 percent of the said amount has been paid to the defendants, the account rendered by the defendants showed that the sale price of the property has been reduced to RM560,802.50. This price is inclusive of the RM80,000 paid by TNB to the defendants as compensation for the part acquisition of the land. Thus, it is contended by the plaintiffs that there is a shortfall of RM42,760 which is not accounted for and remains unexplained by the defendants. The first defendant in his evidence has not been able to explain the shortfall other than stating that it was due to the acquisition by TNB, upon being challenged by the plaintiff. The defendant offers no explanation as to why the terms of the sale and purchase agreement were not followed and, furthermore, the clauses in the agreement clearly provide that any acquisition shall not affect the same. On this issue, I find that in so agreeing to the lesser amount of the sale price, the defendants have not acted in the best interests of the estate and it is to the detriment of the beneficiaries. It is noted that it is for this fact that the plaintiffs being the beneficiaries of the estate are bringing this suit against the defendants. In this respect I find that the account of the estate prepared by the defendants does not constitute a full and proper account as alleged by the plaintiffs. One of the basic duties of all executors or trustees is to render clear and accurate accounts for it is only through proper and accurate accounts that the beneficiaries have the means of knowing whether the estate is being properly administered (see *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 AMR 3904).

[5] In administering the estate, quite naturally, the defendants have incurred expenses, and as evident from Exhibit P3, the following expenses were charged to the account of the estate namely:

i) 5% administration fees under s 43 of the Probate and Administration Act – RM28,040.12

ii) payment of quit rent and assessment rates for 1997 and 1998 – RM9882.28

iii) brokers' commission for sale – RM4,000

iv) legal fees and disbursements – RM5,000

[6] Added to the above deductions, a further amount of RM18,000 was also deducted from the same, being payment made to the mother of the beneficiaries which the plaintiffs later make no issue about.

[7] In respect of the above itemised expenses incurred by the defendants in the administration of the estate, the plaintiffs contend that they are not allowable items and should not be charged to the account of the estate. In his testimony, the first defendant has adduced sufficient evidence for this Court to come to the conclusion that a legal practitioner has been engaged namely Messrs CC Chun & Co to assist the defendants in the administration of the estate dealing with the various legal matters arising thereof. There is ample evidence to show that Messrs CC Chun & Co have been acting for the defendants as executors and trustees of the estate and the documentary evidence produced before the Court is more than sufficient to indicate that. There is therefore justification for the charging of the RM5000 to the account of the estate as legal fees and disbursements. Similarly, I find that the brokers' fees for RM4000 has also been incurred to help the defendant to find a purchaser for the said property. Likewise, the payment of RM9882 being payment for quit rent and assessment rates for the years 1997 and 1998. The evidence of the defendant on this point was never seriously challenged by the plaintiffs and I accept that those expenses were duly incurred by the defendants in administering the estate.

[8] On the 5% administration fees amounting to RM28,040.12, the evidence offered by the defendants clearly show that there is no justification for the claim. I have already ruled that the services of a broker and that of a lawyer has been satisfactorily proved to have been engaged by the defendants in the administration of the estate, however I find insufficient ground to justify the defendants' claim to the 5% administration fees. The defendants sought to base their claim on the basis of s 43 of the Probate and Administration Act 1959 which provides as follows:

> 43. (l) The Court may in its own discretion allow the executors or administrators a commission not exceeding five per centum on the value of the assets collected by them, but in the allowance or disallowance of the commission the Court shall be guided by its approval or otherwise of their conduct in the administration of the estate.
>
> (2) The Registrar may in the course of the taking of the administration accounts of executors or administrators exercise the powers conferred on the Court by subsection (1).

[9] Reading the above provision, it is trite that the power of awarding commission to the executor lies solely at the discretion of the Court after taking into account the conduct of the executor in administering the estate (*Rachel Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as trustee of the estate of Ong Soon Hoe @ Patrick Ong)* [1998] 1 AMR 600). The executor can not on his own simply charge to the account of the estate in claiming for the commission allowed under the Act. The defendants in the instant case, in my view, must make an application to the Court under the said provision and show to this Court their conduct in administering the estate. From the evidence adduced, I do not find that the defendants have done much in the administration of the estate. On the contrary, I find that there has been quite a delay on the part of the defendants in discharging their duties as executors of the estate. The controversies sorrounding the cashing and

payment of the cheques issued by TNB in respect of the compensation for the acquisition of the land fortify my findings as to the conduct of the defendants in dealing with the issue. Similarly, the failure of the defendants to satisfactorily explain about the discrepancy in the price of the properties sold bespeak of their conduct in administering the estate. I further take into consideration the roles played by the legal adviser and the broker who have been duly paid for their services and accordingly hold that the defendants shall not be allowed to unilaterally claim the sum of RM28,040.12 as commission fees. This amount shall accordingly be distributed to the beneficiaries, including the defendants themselves, in accordance with their respective shares in the estate.

[10] In their alternative prayers, the plaintiffs has also urged this Court to replace the defendants as executors and appoint them as administrators of the estate. As observed by Abdull Hamid Embong J in *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177 at p 185:

> This Court is empowered to remove an executor or a trustee where there has occurred a failure to act grounded either on unfitness or incapacity and the primary consideration , on an objective examination of facts, is to determine that the welfare and interest of the beneficiaries and the assets of the estate be safe guarded.

[11] On the facts and circumstances of this case, I however do not find it necessary to consider this issue simply on the ground that the estate has been fully administered. Both parties, from the evidence adduced, agreed that the property of the estate has been disposed of and the proceeds distributed. That being the case, I hold that the prayer of the plaintiffs to replace the defendants as executors is without basis. The subject matter is gone and there is nothing to be administered.

[12] It is my judgment that the estate has been fully administered and that the account provided by the defendants does not reflect a clear and accurate account of the estate. There is a shortfall of RM42, 760 which arises from the sale of the properties which cannot be accounted for by the defendants in administering the estate. Further, the sum of RM 28,040.12 being the 5% commission fees which I disallowed must also be brought back to the account of the estate and these two sums to be distributed to the beneficiaries of the estate, including the defendants in their respective shares as stated in the will of the deceased. I further order that interest at 8% per annum be imposed on the same until final settlement of the shares of the beneficiaries, and costs to the plaintiffs.

Plantiff's application allowed.

Reported by Lim Lee Na